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CATHY A. CATTERSON
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TIME WARNER ENTERTAINMENT, CO., L.P., a Delaware limited partnership dba Warner Bros., Plaintiff - Appellee, v. CONTINENTAL CASUALTY COMPANY, an Illinois Corporation, Defendant - Appellant.	No. 02-56221 D.C. No. CV-01-10235-SVW MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Argued and Submitted June 5, 2003
Pasadena, California

Before: REINHARDT, O'SCANNLAIN, and FISHER, Circuit Judges.

Continental Casualty Co. ("Continental") appeals from the district court's grant of summary judgment to Time Warner Entertainment Co. ("Time Warner")

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

on its duty to defend claim. Because the relevant facts are known to the parties they are not repeated here.

I

At the outset, we note that the scope of the duty to defend is broad under California law. "An insurer . . . bears a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy." Gray v. Zurich Ins. Co., 65 Cal. 2d 263, 276-77 (1966); see also Horace Mann Ins. Co. v. Barbara B., 4 Cal. 4th 1076, 1081 (1993) ("It is by now a familiar principle that a liability insurer owes a broad duty to defend its insured against claims that create a potential for indemnity."); CNA Cas. of Cal. v. Seaboard Surety Co., 176 Cal. App. 3d 598, 605 (1986) ("An insurer's duty to defend must be analyzed and determined on the basis of any *potential* liability arising from facts available . . . to it at the time of the tender of defense.") (emphasis in original).

Indeed, "[i]n resolving the question of whether a duty to defend arises under a policy, the insurer has a higher burden than the insured. The insured need only show that the underlying claim *may* fall within policy coverage; the insurer must prove it *cannot*." Pension Trust Fund for Operating Eng'rs v. Fed. Ins. Co., 307 F.3d 944, 949 (9th Cir. 2002) (citation and internal quotation marks omitted) (emphasis in original).

II

With this background in mind, we turn to Continental's first contention on appeal[1]: that Time Warner's dealings with acclaimed director Francis Ford Coppola do not fall within the Entertainment Risk Insurance Policy's (the "Policy's") coverage for "[i]nfringement of statutory or common law copyright,

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[1] As an initial matter, notwithstanding the merits of Time Warner's claim, Continental claims that it is barred by the twelve month limitations period contained in the Policy. But in Lambert v. Commonwealth Land Title Insurance. Co., 53 Cal. 3d 1072 (1991), the California Supreme Court found that a statutory limitations period was equitably tolled until resolution of the underlying claim. To hold otherwise could

> allow expiration of the statute of limitations on a lawsuit to vindicate the duty to defend even before the duty itself expires. This grim result is untenable. The insured must be allowed the option of waiting until the duty to defend has expired before filing suit to vindicate that duty. Allowing this option is equitable.

Id. at 1077-78. In adopting this rule, the court "recognize[d] the justice and fairness of equitably tolling the insured's action to establish coverage until resolution of the underlying claim." Id. at 1081.

It is true that Lambert involved equitable tolling for a statutory limitation period, and the case at hand involves a privately-negotiated contractual limitation. But the California Supreme Court in Lambert expressed a strong public interest in tolling the limitations period to allow the insured to defend against the underlying substantive claim without having simultaneously to prosecute a collateral action against the insurer. Likewise, it appears here that California law may require tolling of the time that the Coppola suit was pending. In any event, even if California law would not require as such, the Policy failed to state clearly that it intended to deviate from the tolling principle announced in Lambert. Because California has recognized a strong public interest in tolling, and because the Policy does not explicitly provide otherwise, we conclude that Time Warner's suit against Continental was timely commenced.

plagiarism, piracy, or misappropriation of other similar property right," and for piracy or misappropriation of names, trade names, characters, plots, or other similar property right. Continental argues that piracy and misappropriation reference the taking of rights to creative material, and that there were no such allegations set forth in the Coppola complaint.

But in CNA Casualty, the underlying antitrust suit contained allegations that the insured "[k]nowingly misappropriated, stole and misused property interests" and "[m]ade intentional misrepresentations of fact to plaintiffs in an effort to further eliminate the competition of plaintiffs." 176 Cal. App. 3d at 608 n.3. The court found "[t]hese charges [were] arguably within Seaboard's coverage for piracy, unfair competition and idea misappropriation, particularly since these terms [were] undefined in Seaboard's policy." Id. at 608.

In National Union Fire Insurance Co. v. Siliconix Inc., 729 F. Supp. 77 (N.D. Cal. 1989), the court found that "piracy" was susceptible to many definitions and that "it may be interpreted to include such offenses as publication of trade secrets, interference with prospective economic advantage, or trademark infringement." Id. at 80. On the basis of such case law, we conclude that Time Warner made a plausible claim that its conduct fell within the enumerated offenses

of piracy and misappropriation covered by the Policy, thereby invoking Continental's duty to defend under California law.

III

Continental next contends that denial of coverage was appropriate because Section I.A. of the Policy (the relevant provision here) provides that the insurance company must defend against "any Claim seeking damages, injunctive or declaratory relief . . . arising out of [certain enumerated offenses] . . . committed in the utterance or dissemination of Matter by the Insured in the Business of the Insured." Continental points to the fact that "Matter" is defined in the Policy as "printed, audio, visual, or informational works uttered or disseminated in any medium of expression to a mass audience in the Business of the Insured." Because Time Warner's alleged misrepresentations were made only to executives at Columbia and to Coppola before actual production of the proposed "Pinocchio" movie, and thus had nothing to do with dissemination of an artistic work to a mass audience, Continental argues that the Policy does not give rise to a duty to defend for Time Warner's conduct.

But Continental's narrow reading of the Policy overlooks the fact that a covered "Claim" is defined as "the first receipt by the Insured of a demand for money or services, made by a person or entity from the Insured or from an

Indemnified Party, arising out of the dissemination of Matter or the investigation, gathering or acquisition of Matter by the Insured or by an Indemnified Party." (emphasis added). It would appear that this contractual language provides coverage to Time Warner for the pre-production activity of acquiring and defending its property interest in a creative work.

Nevertheless, Continental counters that the Policy should not be read so broadly in light of the contractual language in Section I.B. There, the Policy provides coverage against "any Claim seeking damages, injunctive or declarative relief . . . arising out of [certain enumerated offenses] . . . committed in the gathering, investigation, or acquisition of information . . . for the purpose of inclusion in books, magazines, or News Programming . . . ." Continental points to the absence of any similar language concerning the "gathering, investigation, or acquisition of information" in Section I.A. as to why that provision should be construed more narrowly.

But Continental's argument fails because the absence of language similar to that of Section I.B.—a section that concerns Time Warner's publishing and cable businesses and specifically provides coverage for the act of acquiring and gathering "information" for a story—is of no consequence. Section I.A., unlike Section I.B., already has embedded within it provisions for the gathering,

investigation, or acquisition of Matter. In addition to the definition of "Claim," which includes "arising out of the investigation, gathering or acquisition of Matter," Section I.A. specifically encompasses the "Business of the Insured," which is defined to include "creation, acquisition, pre-production . . . of motion pictures or programs, commercial film . . . script stories . . . (published or unpublished)." Accordingly we reject Continental's argument.

Looking at the policy as a whole—including Section I.C. which provides relief for an "election by the Insured to cease or forego the dissemination of Matter" (undermining Continental's argument that coverage only attaches after a creative work has been released to a consuming audience)—we conclude that the acquisition and creation of material for a motion picture is within the scope of the Policy's coverage.[2] Accordingly, Continental had a duty to defend Time Warner in the underlying Coppola litigation.[3]

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[2] At best for Continental the relevant provisions of the Policy lack a certain degree of clarity but such ambiguities are resolved against the insurer and in favor of coverage. See Reserve Ins. Co. v. Pisciotta, 30 Cal. 3d 800, 807-08 (1982).

[3] Even if the Policy does provide coverage, Continental contends that relevant exclusions are applicable. Continental first cites to exclusion A which prohibits coverage for any claim "arising out of a breach of contract or failure by the Insured . . . to perform any contract." But the Coppola complaint specifically alleged that there never was any binding agreement between the producer and Time Warner. Moreover, Coppola brought claims for slander of title and

(continued...)

AFFIRMED.

[3](...continued)
interference with prospective economic advantage which gave rise to potential liability not subject to this exclusion. Accordingly, exclusion A cannot excuse Continental from its duty to defend. See Horace Mann, 4 Cal. 4th at 1081 (insurer must defend entire action if lawsuit raises at least one potentially covered claim). Continental also points to exclusions C and I which prohibit coverage for suits brought by past or present employees arising out of the subject matter of the employment relationship. As pled by Coppola, he never was an employee of Time Warner. In addition, Coppola's suit against Time Warner concerned the company's interference with his dealings with Columbia, not merely the subject matter of his employment relationship with Time Warner. Accordingly, none of the exclusions to coverage apply.